IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0102

GASTON ENGINEERING & SURVEYING, P.C.,
Appellant,

v.

OAKWOOD PROPERTIES, LLC and YELLOWSTONE BANK,
Appellee.

# APPELLANT'S REPLY BRIEF

On Appeal from the Eighteenth Judicial District Court, Gallatin County, Montana, Honorable John C. Brown, presiding.

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Gaston respectfully submits this Reply Brief to support its appeal.

**A. Signal Perfection applies to this case.**

The Bank tries to distinguish Signal Perfection LTD v. Rocky Mountain Bank-Billings, 2009 MT 365, 353 Mont. 237, 224 P.3d 604 as having "nothing to do" with loans to purchase property. Signal Perfection's Appellee's Brief disproves that argument. Rocky Mountain Bank ("RMB") argued it commingled loan funds for construction with loan funds to purchase property and its "trust indenture should have priority in the amount . . . of the pre-existing loans allegedly used to purchase the real estate." (Appellee's Brief, S. Ct. Cause No. 09-0211, pp. 7-8).

RMB made two arguments. It claimed priority of its trust indenture based on a pre-existing loan to purchase property. It also argued competing construction liens were junior because the holders continued work after RMB's loan was exhausted. (Id.) Both arguments asked this Court to bifurcate the trust indenture according to the advances it secured and award priority based on those advances. (Id., p. 13). Signal Perfection argued against bifurcating the trust indenture under either argument because §71-3-542, MCA provides no method for doing so. (Id., p. 14).

RMB argued lien holders should not have "the right to leapfrog" its trust indenture that secured about $1.16 million "used to purchase the

property, not to pay for the real estate improvements being liened." (RMB's Reply, S. Ct. Cause No. 09-0211, pp. 7-8).

This Court did not factually address RMB's argument about priority based on the purchase loan because it was not raised before appeal. This Court ruled against bifurcating the trust indenture under the second argument about priority based on work done after the loan was exhausted. In so doing, this Court addressed the merits of the legal argument that a court cannot parse out advances made under one security interest and assign priority accordingly. If any portion of the trust indenture was used for construction funds, the ***whole*** trust indenture is junior to the liens. (Signal, 2009 MT 365, ¶¶16-17).

Signal Perfection applies here. Like RMB, the Bank is trying to bifurcate its Mortgage and assign priority based on one of its advances. The Bank wants its "one Mortgage" treated as "two mortgages." (Bank's Response, pp. 30, 33). It claims priority over Gaston's Lien because "one" of the Mortgage's advances paid for land. It brushes off the fact that several payments were for construction work. The Bank even insists on an "independent analysis of both loans for purposes of determining priority over Gaston's Lien," and that "Gaston's 'one' mortgage argument is a fabricated legal fiction." (Id.) Gaston respectfully submits that the Bank has

not read Signal Perfection.

Whether RMB disputed "when or how" the liens attached is irrelevant. The liens attached, and that is all that mattered. Here, the Bank never disputed that Gaston's Lien attached. It quibbles with *when* that happened, but that is a separate argument altogether. Under §71-3-542(4), MCA, "when" the lien attached is irrelevant because the statute subrogates a mortgage to a lien that attached later. Under Signal Perfection, when there is no dispute that "the construction liens at issue attached to the [property] for which the contractors provided services and materials" and the mortgage was used for the "*nonexclusive* purpose of securing advances for the construction," the "plain reading" of §71-3-542(4), MCA means "the construction liens, in their entirety, have priority over the entirety of the trust indenture." (Signal, 2009 MT 365, ¶18).

**1) Signal Perfection prohibits the Bank's attempt to parse out the payments under its one Mortgage.**

In Signal Perfection, this Court held that §71-3-542, MCA "provides this state's method for determining priority between construction liens and other encumbrances on property." (Id., ¶15). The statute does not "discuss or provide any means of partitioning encumbrances or construction liens and then assigning priority among resultant parts." (Id., ¶17). The "plain," "clear and unambiguous" language of the statute requires the Court to

"consider each party's encumbrance – [the bank's] trust indenture and each contractor's construction lien – *as a whole*." (Id., ¶¶16-17, emphasis added). "[W]e reject as unsupported by the language of the statute, that §71-3-542 MCA allows courts to parse encumbrances and then assign priority among the constituent parts." (Id., ¶20).

Loans do not have priority dates. Mortgages do. One mortgage has only one attachment date – its filing date. §71-3-542(2), MCA. Attachment is a legal concept applied against an owner to determine if the security interest attaches to the property. Priority is a legal concept applied among competing secured interests to determine what interest is paid off first. When there is a conflict between security interests the issue of priority arises. At that moment, if a mortgage secures payments for construction work it is legally subordinated to construction liens filed for the construction project, regardless of the liens' attachment dates.

Here, regardless of how many loans the Bank made, it filed one Mortgage, which has one attachment date. The loans secured by the Mortgage may be "nonexclusive" with other payments. But, under a "plain reading" of §71-3-542(4), when priority was examined in this litigation, the Mortgage was legally subordinated to Gaston's Lien because the Mortgage secured payments for construction work. The Bank elected to make its

Mortgage for the "nonexclusive purpose" of securing an advance to construct improvements. The Court should not parse out that portion. Gaston's lien is prior to the whole Mortgage.

Signal Perfection's district court got it right in finding:

> The statutory priority under subsection 4 is absolute on its face. As long as the lender's trust indenture was taken to secure a construction loan taken for the purpose of paying for the improvements liened, the construction lien holder is entitled to priority as a matter of law.

(Order, p. 13, Yellowstone County Cause No. DV-06-0438).

The district court in this case got it wrong. It ignored the Bank's admissions that its Mortgage secured advances to pay for construction work. It treated §71-3-542(4), MCA as non-absolute, and awarded priority based on one advance the Mortgage secures. The Bank admits "Mont. Code Ann. §71-3-542 sets forth fully and exclusively the bases upon which the priority of a construction lien as against non-construction liens is determined." (Response to Sum. Jud. Motion, p. 6, Docket 33). "If the Gaston lien is determined to have attached before the Bank's mortgage was recorded, it has priority. If the loan secured by the Bank's mortgage is determined to have been 'made for the purpose of paying for the particular real estate improvement being liened' then the Gaston lien has priority." (Id.)

**2) The Bank's attempt to insert language into §71-3-542(4), MCA should be refused.**

To avoid the inevitable conclusion of this statute, the Bank is trying to add language that does not appear. Statutory construction rules are clear. The Court may not insert what has been omitted. In re East Bench Irr. Dist., 2009 MT 135, ¶31, 350 Mont. 309, 207 P.3d 1097. Lien holders are not required to prove 100% of the loan proceeds secured by the mortgage went to construction improvements. The only condition is that the mortgage secures advances for construction costs. The Mortgage meets this condition. The Bank admits it "reimbursed Oakwood for entitlement costs, including Gaston engineering fees." (Bank's Response, p. 11). The record includes Bank payments to Gaston and others for construction work, test wells, road excavation, etc. (**Appendix A**; and see, Suppl. Brief in Support of Sum. Jud., Exh. C, pp. YOBank 01107, 01120, 01421-27, Docket 97; and Brief in Support of Sum. Judg., Exhs. E & F, Docket 25).

**B. The Bank could have easily protected its interests and its ability to do so make it junior to the Construction Lien.**

The Bank could have easily taken two mortgages in this case. The mortgage securing construction funds would have its junior position limited to amounts spent on construction. The Bank could have insisted on lien

waivers or paid Gaston, securing such payments against the Mortgage, which secured $2M more than the land's purchase price.

For its own business reasons the Bank did none of these things. It tried to finagle a priority date for its construction payments that was based on an earlier loan to buy land. Montana law prohibits contractors from tacking work under different contracts to gain the benefits of the Statutes, and bankers should not be allowed to do so either. Burns v. A Cash Const. Lien Bond, 2000 MT 233, 301 Mont. 304, 8 P.3d 795.

When the bank lumped all loans into one Mortgage it automatically subordinated the whole to Gaston's Lien. The Bank should not expect this Court to relieve it from the consequences of its own business decision. The Construction Lien Statutes are intended to protect lien holders, not lenders.

It is the Bank's superior position to protect itself that prompted this Court to protect construction lien holders in the line of cases beginning with Beck v. Hanson, (1979) 180 Mont. 82, 589 P.2d 141. The Bank claims these cases are inapplicable because they pre-date the Construction Lien Statutes. But, the Statutes' history shows the policy behind the cases is still alive.

"When interpreting [the Statutes], this Court's only function is to give effect to the intent of the Legislature." State v. Hamilton, 2002 MT 263, ¶14, 312 Mont. 249, 59 P.3d 387. The Court determines legislative intent

based on the Legislature's plain and ordinary language. Contreras v. Fitzgerald, 2002 MT 208, ¶14, 311 Mont. 257, 54 P.3d 983. This Court must reasonably and logically interpret statutory language in a manner giving words their usual and ordinary meaning. (Id.)

The Construction Lien Statutes were enacted in 1987. Before that, Montana operated under mechanic's liens. Prior to the Statutes' rewrite, the Court ruled on priority between a lender's trust indenture and a mechanic's lien in a handful of cases, beginning with Beck (holding that when a lender was aware work would be done and stood to reap the benefit of the contractor's improvements, a mechanic's lien was prior to the lender's trust indenture.) The Court applied this conclusion to purchase money mortgages. Home Interiors, Inc. v. Hendrickson, (1984) 214 Mont. 194, 692 P.2d 1229 and Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., (1986) 221 Mont. 403, 720 P.2d 247.

In cases finding for the lender on different facts, the Court made clear the test remained whether the lenders "knew or had reason to believe the borrowers would incur additional obligations in improving the property." American Fed. Savings and Loan Assoc. v. Schenk, (1990) 241 Mont. 177, 785 P.2d 1024. If so, "the party with the least ability to protect its financial interest should have priority over other prior recorded liens." (Id. at 1027;

and see Corscadden v. Komrosky, (1990) 242 Mont. 7, 788 P.2d 321).

In 1987, the Legislature repealed mechanic's liens and replaced them with the Construction Lien Statutes. In §71-3-542(4), MCA the Legislature enacted a rule for statutory priority on construction liens consistent with the underlying case law. If the lender was or could have been aware contractors would be adding improvements to the lender's collateral, the liens had priority and the lender had the obligation to protect itself.

Signal Perfection distinguished Schenk factually, but affirmed it was still good law after the Statutes' adoption. This Court even noted that RMB was in the best place to protect itself, thus sustaining the "best protection" policy in the context of the modern Statutes. (Signal, at ¶20).

Like the cases cited above, the Bank here "knew or had reason to believe the borrower would utilize the loan proceeds to finance new construction or improvements on real property." The Buy-Sale Agreement made the Property's sale contingent on work Gaston performed. (**Appendix B**, lines 123-124, (from Reply to Suppl. Brief in Support of Sum. Jud., Ex. A Docket 98). Bank loan notes confirm it knew Oakwood was doing a development and would need money for construction expenses. (**Appendix C** (from Suppl. Brief in Support of Sum. Judg., Ex. C, Docket 97)). The Bank recorded its Mortgage for $2M more than the land's purchase price

because it knew there would be construction costs. The Bank knew its loan would pay for construction, controlled the distribution of payments to contractors, stood to reap the benefits of the improvements being made, and was in a better position to protect itself than the contractors making those improvements.

Interestingly enough, the purchase money mortgage statute on which the Bank relies (§71-3-114, MCA) existed when this Court ruled on the cases above. This Court still found for the lien holder in those cases even when a purchase money mortgage was involved. And rightly so. Montana's history has long protected the men and women who *do* the work that gives the bank a chance to close a loan and make interest profits in the first place.

**C. The Mortgage's future advance clause is a red herring.**

Whether or not the Mortgage allows the Bank to make a future advance is irrelevant. That clause says nothing about priority. Section 71-3-542(4), MCA is not about priority. It is about subordination. It takes the normal priority scheme and gives a construction lien priority if money was advanced to pay for construction costs. The Bank missed this point. The future advance clause says nothing about subordination of its priority date to a lien that meets §71-3-542(4)'s criteria (or any other type of lien that has legal priority). Under §71-3-542(4), MCA the Bank must subordinate whatever

priority date it can prove to the Construction Lien's superior claim.

And, as a private agreement with Oakwood, not Gaston, the Bank's future advance clause cannot contravene Gaston's legal rights under the Construction Lien Statutes. §28-2-702, MCA.

**D. The Bank misrepresents Gaston's argument about its Lien's attachment date.**

The Bank's claim that this appeal should turn on whether Gaston provided an "alternate attachment date" to June 12, 2006 makes no sense. First, the Bank never raised this argument below and cannot raise it for the first time on appeal. (State v. Wetzel, 2005 MT 154, ¶13, 327 Mont. 413, 114 P.3d 269). Plus, there is no mystery to Gaston's position. **Either** its Lien has priority under §71-3-522, MCA because it attached first, **or** it has priority under §71-3-542(4), MCA because the Mortgage secured construction payments. In the first position, Gaston's work on June 12, 2006 is relevant. In the second position, the actual date of attachment is irrelevant. Nothing requires Gaston to prove an alternate attachment date to June 12, 2006. The Bank's claim that Gaston's case suffers the "infirmity" of not articulating an alternate attachment date is incorrect.

No party to this case disputes that Gaston's Lien attached. (See, Response to Sum. Jud., p.1, Docket 33, "the lien attached after the mortgage was recorded"; and Stip. Judg., ¶4, Docket 45). The district court proceeded

without dispute that Gaston's Lien attached. (Order Re: Sum. Judg., Docket 131). If this Court finds Gaston's Lien did not attach until after the Mortgage was recorded, it can still overturn the district court based on Gaston's priority under §71-3-542(4), MCA.

**E. Gaston's Lien attached before the Mortgage.**

There are other reasons besides §71-3-542(4), MCA and Signal Perfection to overturn the district court. The court erred in concluding Gaston's Lien was junior to the Bank's September 20, 2006 Mortgage and that it did not attach when work commenced on June 12, 2006. Gaston's Lien confirms it worked from June 12, 2006 to September 18, 2007. (Complaint, Ex. A, Docket 1). The district court agreed Gaston's work first began June 12, 2006. (Order Re: Sum. Jud., p. 2, Docket 131). No one disputed or appealed that finding. The only other party to this case that could confirm when Gaston's work commenced was Oakwood, and Oakwood stipulated Gaston's work commenced on June 12, 2006. (Stip. Judg., ¶1, Docket 45). Under §71-3-535(5), MCA because Gaston's worked commenced June 12, 2006, it is prior to the Mortgage recorded on September 20, 2006.

**1) As party to an enforceable Buy-Sale Agreement, Oakwood was legally the Property's owner on June 12, 2006.**

Whether the Property's deed had transferred fee title to Oakwood on June 12, 2006 is irrelevant. "The authorities are in accord that an enforceable contract for the purchase and sale of real property passes to the purchaser the equitable and beneficial ownership thereof," which is called "equitable conversion." Kern v. Robertson, (1932) 92 Mont. 283, 12 P.2d 565, 567; and Johnson v. Equip. Used to Cultivate Marijuana, (1995) 271 Mont. 500, 504, 898 P.2d 1200, 1202-3. "[E]quity says that from the contract, even while yet executory, the vendee acquires a 'real' right, a right of property in the land, which though lacking legal title, and therefore equitable only, is none the less the real, beneficial ownership." Kern, 12 P.2d. at 567. "The vendor still holds an equitable ownership of the purchase money; his property, as viewed by equity, is no longer real estate, in the land, but personal estate, in the price. . . ." (Id.) "The original estate of each [party has] been 'converted,' that of the vendee from personal into real property, and that of the vendor from real into personal property." (Id.) Oakwood was "owner" of the Property on June 12, 2006, when Gaston commenced its work, because it had executed a Buy-Sell Agreement for the Property that day. (Response to Suppl. Brief in Support of Sum. Jud., Exh. A, Docket 98).

No statute or case law says a deed had to be recorded in Oakwood's name when Gaston's work commenced for §71-3-535(5) to apply. A deed recorded in Oakwood's name must be of record only when the lien is *filed.* (Swain v. Battershell, 1999 MT 101, 294 Mont. 282, 983 P.2d 873). The Bank misrepresented Swain's holding. That case does not say that a lien cannot encumber property unless and until the lien claimant has a real estate improvement contract with a person who owns fee title.

The Legislature has not limited the definition of "contracting owner" to only those with a recorded deed when work commences. Section 71-3-525(4)(a)(i), MCA says a "construction lien is not impaired to the extent of the value of the work or improvement that is severable from the real estate if the improvement is to premises held *by a contracting owner who owns less than a fee simple interest.*" Section 71-3-525(3), MCA allows liens against contracting owners who are lessees. Section 71-3-525(5), MCA allows a "contracting owner" to contract for improvements on real estate "not owned by him" for the benefit of his other property.

It would be bad policy to apply the Bank's argument about fee title. Potential buyers often retain services like Gaston's as due diligence work before closing a sale. Those who perform such work make the sale possible, benefiting everyone including the lender. Those workers should not lose the

protections of the Construction Lien Statutes because the deed had not yet been recorded. This is especially true here. The Buy-Sell clearly referenced and made the deal contingent on the work Gaston performed. (**Appendix B**, lines 123-124 (from Docket 98)). The seller allowed work to begin immediately (which Gaston did that day, June 12, 2006). (Id., lines 135-137). The seller assumed the work results and costs if the deal fell through. (Id.)

The Buy-Sell was in the Bank's records. (Response to Suppl. Brief in Support of Sum. Jud., Exh. A, Docket 98). The Bank offered a self-serving affidavit to claim it did not know work would be done. But, its loan file contradicts this. The Bank even agreed to pay for some of the work. (**Appendix C**, p. YOBank 01564 (from Docket 97)).

Montana law does not condition a lien's attachment on anything other than the first visible change to the Property (which change may not even be done by the lien holder benefiting from the attachment date). §71-3-522, MCA. Nothing conditions attachment on whether a deed is recorded in the owner's name when work commences.

The Bank admitted Oakwood was the "contracting owner *as that term is defined by statute.*" (Amend. Answer ¶2, Docket 11). It is bound by its admissions. (Audit Services, Inc. v. Frontier-West, Inc., (1992) 252 Mont.

142, 827 P.2d 1242). The Pre-trial Order does not undo the Bank's prior admission. A pre-trial order supersedes the pleadings with regard to the "issues to be tried." Advisory Comm. Notes to Uniform Dist. Court Rule 5. No trial was held. The pre-trial order included Gaston's contentions that the Bank was estopped from denying its earlier admission and the district court never resolved the issue.

**2) Under §71-3-525(1), Gaston's Lien, which attached on June 12, 2006, extends to the interest Oakwood "thereafter acquired" on September 20, 2006.**

The district court erred in relying on Black's Law Dictionary's definition of "thereafter acquired" to claim that those terms only apply to an already-existent ownership interest that grows. The court's interpretation of "thereafter acquired" is not found in §71-3-525(1), MCA and stretches that section beyond a reasonable reading. The terms "thereafter acquired" mean a construction lien can apply, like here, where the owner "acquires" fee title interest "after" work commences. This reading makes §71-3-525(1), MCA comply with the law of equitable conversion and finds support in other lien statutes using the identical terms "afterward acquired":

> From the time the judgment is docketed, it becomes a lien upon all real property of the judgment debtor that is not exempt from execution in the county **and that is either owned by the judgment debtor at the time or afterward acquired by the judgment debtor before the lien ceases.**

Mont. Code Ann. §25-9-301(2) (emphasis added).

The current version of §71-3-525(1) uses "subsequently acquired," which support Gaston's argument.

The Bank misapplies §71-3-105, MCA about liens on a future interest. That statute would governs if the Property did not exist or Oakwood had not yet acquired it when Gaston *recorded its Lien.* Liens are *created* by recordation. (Mont. Code Ann. §§71-3-535(1) and (2)(a)). Because Oakwood acquired equitable title on June 12, 2006 and legal title on September 20, 2006 – all before Gaston created its Lien – §71-3-105, MCA does not apply.

**F. The Mortgage is not a purchase money mortgage ("PMM").**

The Mortgage is not a PMM because it secured advances to pay for construction costs. The district court erred in relying on §71-3-114, MCA because that statute does not authorize a "purchase money ***loan***" and the court based its holding on one loan the Mortgage secured.

The Bank's cite to §71-3-114, MCA omitted the key phrase: "except as otherwise provided by law." This limiting language confirms what we know about statutory construction: "when a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." §1-2-102, MCA. The Construction Lien Statutes *specifically* give construction liens priority over

***any other mortgage;*** the "general provisions" of lien law in §71-3-114, MCA give a PMM priority over ***any other lien.*** There is a conflict between these statutes. The specific Construction Lien Statutes control the general lien statutes. (Id.) Giving a PMM priority over a prior-attached construction lien eradicates the plain language of §71-3-542(1), MCA. This Court has already held that it is Section 71-3-542 that "provides this state's method for determining priority between construction liens and other encumbrances on property." (Signal Perfection, ¶15). Montana is not alone in this holding. Michigan's Construction Lien Act similarly

> gives a construction lien 'priority over all other interests, liens . . . when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.' There is no broader classification than the word 'all,' which, given its ordinary and natural meaning, leaves no room for exceptions. . . . Thus, given the plain and unambiguous language of the statute, any mortgage, including a purchase-money mortgage, is subordinate to a construction lien if the mortgage is recorded after the first actual physical improvement has been made to the property."

Skotak v. Vic Tanny Int'l, Inc., 203 Mich. App. 616, 619, 513 N.W.2d 428 (Mich. 1994); and see, MCL 570.1119(4).

In adopting the Construction Lien Statutes, Montana's Legislature said:

> with regard to priority of construction lien holders as against other claims, the construction lien claimant has priority over ***any lien filed after the construction lien attached, i.e., the start of the project.*** A lien filed before the construction lien attaches has priority except if . . . b) the other lien is for a construction loan, i.e., one given to secure advances to pay for that particular construction project.

(Senate Judiciary Exh. 7, SB20, Jan. 16, 1987).

The Legislature could have made an exception for PMMs. Its purposeful failure to do so, in light of an intent to protect construction lien holders, means §71-3-542(1), MCA prevails.

The Bank's reliance on Soliri v. Fasso, (1919) 56 Mont. 400, 185 P. 322, has no merit. Soliri pre-dates the Construction Lien Statutes by almost 70 years. In those seven decades, this Court has awarded priority to construction liens over purchase money mortgages. (See, Hendrickson, 214 Mont. at 194, *supra*).

**G. The Bank misrepresents the summary judgment history of this case.**

To say the Bank filed a summary judgment motion in response to Gaston's "second motion" for summary judgment misrepresents the record. Gaston never filed such "second motion" and the Bank never filed a summary judgment motion.

On February 8, 2008, Gaston served discovery on the Bank for its "entire file regarding the Mortgage," including its complete "loan file,

workout file, correspondence file or underwriter file." (Motion for Sanctions, p. 2, Docket 71). The Bank produced a small file of the promissory notes, mortgage, etc. On July 10, 2008, Gaston wrote the Bank stating that documents involved in a loan of this size were excluded, such as "comments about the loan" when it "was proposed." (Id.) The Bank responded that it had produced "everything" and Gaston should not intimate it was withholding documents. (Id.)

Gaston then filed its expert disclosure, stating there was a serious absence of loan documentation from the Bank's file. (Id.) The Bank could have re-checked its disclosure. But, it turned nothing more over to Gaston. A year later, an attorney not involved in this case gave Gaston over 1800 documents from the Bank's "loan file." (Id., pp. 3-4). Among those documents were Bank checks for Gaston's work, comments by Bank officer Paul proving the Bank agreed to "advance funds to pay the invoice to Gaston." (Id., p. 5; see **Appendix A & C**).

Gaston filed a Motion for Sanctions against the Bank. (Id.) To resolve the Motion, the Bank paid Gaston's fees for the motion and allowed it a supplemental brief in support of its summary judgment motion. (Id., and see Suppl. Brief in Support of Sum. Judg., Docket 97). The Bank responded to Gaston's supplemental brief on August 25, 2009, but the intent was not to

re-open the October 17, 2008 motions deadline, which the Bank had already missed. (Response to Suppl. Motion for Sum. Judg., Docket 98, and Sch. Order, p. 2, Docket 13). The Bank's response never sought to reopen the summary judgment deadline nor made a proper motion for summary judgment. The Bank simply never filed for summary judgment. The court's Order Re: Summary Judgment, which ruled on "*Plaintiff's* pending motion," confirmed this. (SJ Order, p. 1, Docket 131, emphasis added).

**H. Gaston wants only a *first* bite of the apple.**

The record shows that the Rule 59(g) motion is intended to litigate matters never before litigated in this case. The Bank's appeal response did not dispute that Gaston's offer of proof at the summary judgment hearing preserved factual issues for trial (thus preventing summary judgment for the Bank), nor that the district court agreed to Gaston's offer of proof. The Bank never disputed that, just before the district court's decision, Gaston received additional documents that shed new light on summary judgment. These arguments are, therefore, well taken. The court should have granted the Rule 59(g) motion to consider the new documents and hold trial on the issues Gaston raised. Gaston did not have to file affidavits to show that the Mortgage was not used to purchase property. The Bank already admitted it intended to and paid for construction costs.

**I. The Bank's arguments about Mr. Farmer's expert testimony should be disregarded as raised for the first time on appeal.**

For the first time in this appeal the Bank argues that Gaston's expert testimony is insufficient. Arguments raised for the first time on appeal are disregarded. (State, 2005 MT 154 at ¶13). Gaston disclosed its expert on August 15, 2008. (Expert Wit. Discl., Docket 32). The Bank had until October 17, 2008 to file a motion to strike the disclosure. (Sch. Order, Docket 13). It could have named a rebuttal expert. It had until September 12, 2008 to depose Mr. Farmer. (Id.) It did none of these things and waited until this appeal to criticize the disclosure.

The Bank is not correct to say Mr. Farmer's disclosure never addressed the issue of a PMM. Mr. Farmer's disclosure concluded the "mortgage was unquestionably intended to fund the build out of the subdivision" rather than simply to purchase property. (Expert Wit. Discl., Docket 32).

Mr. Farmer's affidavit, filed in support of Gaston's Rule 59 Motion is valid. Because Mr. Farmer is an expert he does not have to witness facts first-hand. He can rely on facts or data "perceived by or made known to [him] at or before the hearing." Mont. R. Evid. 703. The facts he relied on need not be admissible. (Id). His testimony is not objectionable because it embraces the ultimate issue. Mont. R. Evid. 704.

**J. Conclusion:**

Gaston respectfully requests that this Court OVERTURN the Order Re: Summary Judgment and grant Gaston's summary judgment motion, or, in the alternative, GRANT Gaston's Rule 59(g) Motion.

Dated: Aug 16, 2010.

Kellie G. Sironi

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 16 2010 a true and accurate copy of the foregoing document was served by U.S. Mail, postage prepaid, on:

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief, pursuant to Mont. R. App. Pro. 11(4)(e) is proportionately spaced, 14 pt., and contains 4995 words.

Kellie G. Sironi